

## You cannot eat critique: on uncritical critical (legal) theory and the poverty of bullshit

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# YOU CANNOT EAT CRITIQUE: ON UNCRITICAL CRITICAL (LEGAL) THEORY AND THE POVERTY OF BULLSHIT

Matthew Evans\*<sup>†</sup> 

*This article reflects upon critical theory, focusing especially on critical legal theory, particularly in relation to human rights. Positing that much critical theory is in fact uncritical, the article argues that critical theory is frequently deployed in such a way as to contradict its supposed purposes of challenging the prevailing order, orthodoxy and injustice, and guiding radical change. It is argued that in deploying critical (legal) theory there is a danger of producing bullshit, which scholars should be mindful of and should seek to avoid. Finally, the article suggests moving towards postdisciplinarity and to greater integration of critique with theory and practice as possible resolutions to the dilemmas and contradictions exposed by drawing attention to bullshit and uncritical critical (legal) theory.*

**Keywords:** critical theory, bullshit, human rights, critical legal theory, postdisciplinarity, Foucault, uncritical critics

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<sup>†</sup> This article is inspired in part by a number of conversations with colleagues over several years. In this regard, particular thanks must go to Marie Hutton, Tanya Palmer, Nuno Ferreira and Pádraig McAuliffe. An earlier version of the paper was presented at the Sussex Centre for Human Rights Research Work in Progress Seminar (University of Sussex, Brighton, 9 October 2019), where useful comments were received – thanks must go to the organisers and participants, especially Stephanie Berry, Charlotte Skeet, Lindsay Stirton and Lara Montesinos Coleman. Further thanks must go to the anonymous reviewers and to Tarik Kochi.

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## I. INTRODUCTION

Theory, it is said, is 'always *for* someone and *for* some purpose'.<sup>1</sup> This invites the questions of *who* and *what* it is for. This article considers these questions, focusing on critical theory – particularly critical *legal* theory – and its deployment by scholars. Robert Cox contrasts 'critical' and 'problem-solving' theories.<sup>2</sup> Critical theories are those which do not 'take institutions and social and power relations for granted'.<sup>3</sup> Moreover, '[c]ritical theory allows for a normative choice in favour of a social and political order different from the prevailing order', a 'principle objective' being to 'clarify [the] range of possible alternatives'.<sup>4</sup> This is more or less congruent with the formulation proposed by the *Critical Legal Thinking* blog: critique is 'minimally' understood 'as the challenging of orthodoxy, ideology and systemic injustice' and is 'the companion and guide of radical change'.<sup>5</sup> However, some – perhaps even *much* – of what is put forward as critical (legal) theory does not do what these formulations suggest it should. Indeed, '[c]ritique has not been critical enough in spite of all its sore-scratching'.<sup>6</sup>

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<sup>1</sup> Robert W Cox, 'Social forces, States and World Orders: Beyond International Relations Theory' (1981) 10 *Millennium: Journal of International Studies* 126, 128.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid 129.

<sup>4</sup> Ibid 130.

<sup>5</sup> Critical Legal Thinking, 'Submissions' (Critical Legal Thinking) <<http://criticallegalthinking.com/Submissions/>> accessed 12 June 2019; see also David Jabbari, 'From Criticism to Construction in Modern Critical Legal Theory' (1992) 12 *Oxford Journal of Legal Studies* 507, 507.

<sup>6</sup> Bruno Latour, 'Why Has Critique Run out of Steam? From Matters of Fact to Matters of Concern' (2004) 30 *Critical Inquiry* 225, 232.

Though it has been over four decades since the publication of EP Thompson's *The Poverty of Theory*,<sup>7</sup> and over three since the first appearance of *On Bullshit* by Harry Frankfurt,<sup>8</sup> both remain useful in thinking through the issues covered here. 'Bullshit', in Frankfurt's sense, is a form of dishonesty short of lying, where claims are deployed without regard for whether they are true or false.<sup>9</sup> It includes that which 'lack[s] evidence' or is 'obscure, ambiguous, unnecessarily wordy or disorderly'.<sup>10</sup> It is put forward 'to suit [the bullshitter's] purpose',<sup>11</sup> rather than to further other goals, such as clarification or truth-seeking. Neil Stammers's notion of 'uncritical critics' of human rights (as compared to both 'critical' and 'uncritical proponents') is also useful for the purposes of this article, as is Dustin Sharp's recent work reflecting on bringing together critical theory and 'critically motivated problem-solving theory' in transitional justice.<sup>12</sup> Indeed, there is an emphasis on critical theory and human rights throughout. These lenses of analysis are applied in the discussion which follows, arguing that too much of what passes for critical theory is both bullshit and deeply uncritical.

This article is deliberately provocative. It is somewhat polemical – it is in part 'a critical polemic against polemical critics'.<sup>13</sup> The intention is to disrupt, to stimulate thought and – perhaps – action. Analysis, theorisation, and critique are things which are *done* purposively. They can, then, be done differently. Moreover, criticality does not inhere in an author. The same person (even the same piece) might produce both critical and uncritical critique. It is not

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<sup>7</sup> EP Thompson, *The Poverty of Theory and Other Essays* (Merlin 1978).

<sup>8</sup> Harry G Frankfurt, 'On Bullshit' (1986) 6 *Raritan Quarterly Review* 81; Harry G Frankfurt, *On Bullshit* (Princeton University Press 2005).

<sup>9</sup> Frankfurt, *On Bullshit* (n 8).

<sup>10</sup> Petter A Naessan, Book review of *On Bullshit* by Harry Frankfurt (2005) 53 *Philosophy Now* <[https://philosophynow.org/issues/53/On\\_Bullshit\\_by\\_Harry\\_Frankfurt](https://philosophynow.org/issues/53/On_Bullshit_by_Harry_Frankfurt)> accessed 24 July 2019.

<sup>11</sup> Frankfurt, *On Bullshit* (n 8) 56.

<sup>12</sup> Neil Stammers, *Human Rights and Social Movements* (Pluto Press 2009) 8; Neil Stammers, 'Human Rights and Social Movements: Theoretical Perspectives' (2015) 75 *Revue interdisciplinaire d'études juridiques* 67; Dustin N Sharp, 'What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice' (2019) 13 *International Journal of Transitional Justice* 570.

<sup>13</sup> Anthony J Langlois, 'Human Rights in Crisis? A Critical Polemic Against Polemical Critics' (2012) 11 *Journal of Human Rights* 558.

suggested that all critical theory suffers from the problems identified here, or that these issues apply equally and in the same way to all critical theory or its application. Critical theory is far from homogenous.<sup>14</sup>

The intention here is therefore not to provide an overview of or response to the entire oeuvre of critical (legal) theory – this would be far outside the scope of an article such as this. Moreover, the works discussed in this piece are not chosen with a view to them being representative of critical (legal) theory as a whole. Rather, the article focuses on some particular tendencies evident in some, but not all, critical (legal) theory. The works of critical theory discussed here are chosen as illustrative examples which highlight potentially uncritical tendencies and – especially – dilemmas and implications which emerge from them. The empirical examples of activism and practice are likewise not representative of all possible applications of the issues discussed in the article. They are instead used to illustrate and illuminate some of the practical implications of the more theoretical discussion in the article.

The following analysis is interpretative and exploratory. Furthermore, the provocation – or invitation – of this article is as much self-reflexive and self-directed as it is outward-facing. It is not written from a position outside of the phenomena it discusses. Following John Holloway, it is an attempt, no doubt flawed and partial, to think and act 'in, against, and beyond'<sup>15</sup> critical (legal) theory. In doing so the article also seeks to move beyond disciplinary perspectives. It is not concerned *only* with critical legal theory. Thinking across and beyond disciplines is necessary to make the arguments put forward here, which draw on multiple areas outside law and legal theory, as well as interdisciplinarity, transdisciplinarity and postdisciplinarity.<sup>16</sup> This focus is

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<sup>14</sup> Ben Golder, 'Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought' (2014) 2 *London Review of International Law* 77.

<sup>15</sup> John Holloway, *In, Against, and Beyond Capitalism: The San Francisco Lectures* (PM Press 2016).

<sup>16</sup> Raymond C Miller, 'Interdisciplinarity: Its Meaning and Consequences' *Oxford Research Encyclopedia of International Studies* (20 November 2017). DOI: 10.1093/acrefore/9780190846626.013.92; Andrew Sayer, 'Long Live Postdisciplinary Studies! Sociology and the Curse of Disciplinary Parochialism/Imperialism'. Paper presented to the British Sociological Association Conference, Glasgow, April 1999, published by the Department of

in part motivated by the experience of having studied and taught multiple disciplines and of being, by a quirk of circumstance, based in a law school without having trained as a practising or academic lawyer.

The article argues that too often in critical theory orthodoxies are reinforced rather than challenged, the possibilities for radical change are obscured and the prevailing order reinforced. Too much critical theory is, in a sense, uncritical. In the sections that follow, each of these interrelated trends are explored. In the final substantive section, some possible approaches to resolving the dilemmas and contradictions the article sets out are offered, before conclusions are put forward. These relate to the possibility of moving beyond disciplinary divides – towards postdisciplinarity – in order to make use of the most appropriate intellectual tools and avoid disciplinary parochialism and imperialism. In this way, the article points towards the possibility of integrating critique with theory and practice in order to avoid utopianism and better identify where and how change might be achieved.<sup>17</sup>

## II. REINFORCING ORTHODOXIES

For all that critical (legal) theory affects towards challenging orthodoxies, it nevertheless contains orthodoxies and (small-c) conservative tendencies.<sup>18</sup> A

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Sociology, Lancaster University. <<https://www.lancaster.ac.uk/fass/resources/sociology-online-papers/papers/sayer-long-live-postdisciplinary-studies.pdf>>

accessed 22 May 2019; Andrew Sayer, 'For Postdisciplinary Studies: Sociology and the Curse of Disciplinary Parochialism/Imperialism' in John Eldridge, John MacInnes, Sue Scott, Chris Warhurst and Anne Witz (eds) *For Sociology: Legacies and Prospects* (Sociologypress 2000); Justin Rosenberg, 'International Relations – The "Higher Bullshit": A Reply to the Globalization Theory Debate' (2007) 44 *International Politics* 450.

<sup>17</sup> See Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16); Sharp (n 12); Ron Dudai, 'The Study of Human Rights Practice: State of the Art' (2019) 11 *Journal of Human Rights Practice* 273.

<sup>18</sup> Matt McManus, 'On Critical Legal Studies and the Limits of Critique' (Merion West, 29 September 2018) <<https://merionwest.com/2018/09/29/on-critical-legal-studies-and-the-limits-of-critique/>> accessed 3 July 2019; Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart 2005) 247; Costas Douzinas, Peter Goodrich and Yifat Hachamovitch, 'Introduction: Politics, Ethics and the Legality of the Contingent' in Costas Douzinas, Peter Goodrich and Yifat Hachamovitch (eds), *Politics, Postmodernity*

small number of theorists and approaches have become canonised and, at times, placed almost beyond reproach.<sup>19</sup> Matthew Stone, Illan rua Wall and Costas Douzinas, for instance, argue that they do not 'identify, categorise and worship a [critical (legal) theory] canon'.<sup>20</sup> Nevertheless, in their words, 'it should come as no surprise' that a group of particularly influential theorists are easily identifiable.<sup>21</sup> Michel Foucault is chief among these.<sup>22</sup> To be blunt, Foucault is overrated.<sup>23</sup> This does not mean that nothing about his body of work is ever useful – frequently it is – but the degree of attention paid to Foucault is massively disproportionate to his actual contributions.<sup>24</sup> As Lara Montesinos Coleman notes, regardless of his contributions, 'Foucault's critical ethos can be neither starting point nor end of engagement with

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*and Critical Legal Studies: The Legality of the Contingent* (Routledge, 1994) 13–14; Jasmine Chorley, Rob Hunter, Dimitrios Kivotidis, Eva Nanopoulos, Paul O'Connell and Umut Özsu, 'About' (Legal Form: A Forum for Marxist Analysis of Law, October 2017) <<https://legalform.blog/About/>> accessed 29 August 2019.

<sup>19</sup> Dylan Riley, 'Bourdieu's Class Theory: The Academic as Revolutionary' (2017) 1 Catalyst 107; Daniel Zamora, 'Can We Criticize Foucault?' *Jacobin* (10 December 2014) <<https://www.jacobinmag.com/2014/12/foucault-interview/>> accessed 17 June 2019; Daniel Zamora, 'Introduction: Foucault, the Left, and the 1980s'. In Michael C Behrent and Daniel Zamora (eds), *Foucault and Neoliberalism*, Ebook Edition (Polity Press 2016); Chorley and others (n 18).

<sup>20</sup> Matthew Stone, Illan rua Wall and Costas Douzinas, 'Introduction: Law, Politics and the Political' in Matthew Stone, Illan rua Wall and Costas Douzinas (eds), *New Critical Legal Thinking: Law and the Political* (Birkbeck Law Press 2012) 7.

<sup>21</sup> Ibid 4; also Douzinas and Gearey (n 18) 242.

<sup>22</sup> See also Zamora, 'Can We Criticize Foucault?' (n 19); Zamora, 'Introduction' (n 19); Riley (n 19) 107.

<sup>23</sup> Karlene Faith, Book Review of *Up against Foucault: Explorations of Some Tensions between Foucault and Feminism* edited by Caroline Ramazanoğlu (1995) 23 Crime, Law and Social Change 257. Susan Bordo, 'Feminism, Foucault and the Politics of the Body' in Caroline Ramazanoğlu (ed), *Up against Foucault: Explorations of Some Tensions between Foucault and Feminism* (Routledge, 1993); Michael C Behrent, 'Conclusion: The Strange Failure (and Peculiar Success) of Foucault's Project' in Michael C Behrent and Daniel Zamora (eds), *Foucault and Neoliberalism* (Polity Press 2016).

<sup>24</sup> Faith (n 23) 257–258. Of course, this article further contributes to this attention.



actually existing struggles'.<sup>25</sup> Moreover, whilst 'not all academics who love Foucault are neoliberals[,] the neoliberal academy, thought of as a "diffuse network of power relations", certainly loves Foucault'.<sup>26</sup> Indeed, a 'Foucault industrial complex' has developed in and around academia.<sup>27</sup> One possible reason for this is the degree to which it is possible for scholars deploying Foucault to say whatever they please and see themselves reflected back in Foucault, who was notoriously reluctant to give unambiguous, authoritative interpretations of his own work.<sup>28</sup> Indeed, he said 'I prefer not to identify myself, and I'm amused by the diversity of the ways I've been judged and classified'.<sup>29</sup>

Some might view multiple – and potentially contradictory – possible interpretations as a strength. Foucault himself seemed to. Noting that he has

been situated in most of the squares on the political checkerboard, one after another and sometimes simultaneously: as anarchist, leftist, ostentatious or disguised Marxist, nihilist, explicit or secret anti-Marxist, technocrat in the service of Gaullism, new liberal and so on[,]

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<sup>25</sup> Lara Montesinos Coleman, 'Ethnography, Commitment, and Critique: Departing from Activist Scholarship' (2015) 9 *International Political Sociology* 263, 263.

<sup>26</sup> Progressive Geographies, Comment on 'Foucault and Neoliberalism – A few Thoughts in Response to the Zamora Piece in Jacobin' by Stuart Elden, posted by the user wobblywheel at 8:55pm (Progressive Geographies, 31 December 2014) <<https://progressivegeographies.com/2014/12/17/foucault-and-neoliberalism-a-few-thoughts-in-response-to-the-zamora-piece-in-jacobin/#comment-72160>> accessed 17 June 2019.

<sup>27</sup> This term comes from comments made by Paul McGuinness on 3 October 2018 at the Critical Theory Reading Group, Sussex Law School, University of Sussex, Brighton.

<sup>28</sup> Zamora, 'Introduction' (n 19).

<sup>29</sup> Michel Foucault, 'Polemics, Politics and Problematizations: An Interview Conducted by Paul Rabinow in May 1984' <<https://foucault.info/documents/foucault.interview/>> accessed 22 July 2019.



Foucault posited that

[n]one of these descriptions is important by itself; taken together, on the other hand, they mean something. And I must admit that I rather like what they mean.<sup>30</sup>

This diversity of possible interpretations is, however, also a weakness.<sup>31</sup> There is a danger that Foucauldian critique could mean almost anything, and thus that it could be reduced to the bullshit Frankfurt wrote against.<sup>32</sup>

As noted above, utterances which 'lack evidence' or which 'are obscure, ambiguous, unnecessarily wordy or disorderly' could be bullshit.<sup>33</sup> The bullshitter has no regard for whether their claims are true or false.<sup>34</sup> Rather, they are concerned with 'trying to get away with something'<sup>35</sup> – picking out or making up claims 'to suit [the bullshitter's] purpose', whatever that may be at the time.<sup>36</sup> It is entirely possible for Foucauldian critique to contain bullshit, particularly if it claims to be more authentic, or more authoritative, than alternative interpretations.<sup>37</sup> This does not mean that Foucault was a bullshitter, but Foucauldian bullshit is not difficult to produce. Bruno Latour makes a somewhat similar – but more general – point, arguing that 'critique [...] has become such a potent euphoric drug' because, as a critic:

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<sup>30</sup> Ibid.

<sup>31</sup> Zamora, 'Introduction' (n 19). See also, more generally, Steven Knapp and Walter Benn Michaels, 'Against Theory' in Vincent B Leitch, William E Cain, Laurie Finke, Barbara Johnson, John McGowan and Jeffrey J Williams (eds), *The Norton Anthology of Theory and Criticism* (WW Norton 2001).

<sup>32</sup> Frankfurt, *On Bullshit* (n 8).

<sup>33</sup> Naessan (n 10).

<sup>34</sup> Frankfurt, *On Bullshit* (n 8).

<sup>35</sup> Ibid 23.

<sup>36</sup> Ibid 56. There may be circumstances where such bullshitting is expected or necessary (perhaps even desirable). One such instance might be in the roles of lawyers in adversarial systems, with each side required to pick out and interpret evidence in order to put forward the best position for their clients, rather than to provide the fullest or most accurate account of events (thanks must go to Lindsay Stirton for raising this point). A key claim of this article, however, is that bullshit is unnecessary, undesirable and ought to be avoided in critical theorising.

<sup>37</sup> See Behrent (n 23).

[y]ou are always right! When naïve believers are clinging forcefully to their objects, claiming that they are made to do things because of their gods, their poetry, their cherished objects, you can turn all of those attachments into so many fetishes and humiliate all the believers by showing that it is nothing but their own projection, that you, yes you alone, can see. But as soon as naïve believers are thus inflated by some belief in their own importance, in their own projective capacity, you strike them by a second uppercut and humiliate them again, this time by showing that, whatever they think, their behavior is entirely determined by the action of powerful causalities coming from objective reality they don't see, but that you, yes you, the never sleeping critic, alone can see.<sup>38</sup>

The canonisation of certain critical theorists – particularly Foucault – is further evident in the fact that *Jacobin* headlined a piece 'Can We Criticize Foucault?'.<sup>39</sup> Foucault scholars were quick to maintain that Foucault can be and has been criticised.<sup>40</sup> Nevertheless, there is a danger here. In Michael Behrent's words, this

consists in turning Foucault into [a] fantasy philosopher, the thinker [readers] want him to be – an unrelenting critic of Marxism who somehow remained a kind of socialist; a Nietzschean who embraced solid progressive principles. This is just wishful thinking.<sup>41</sup>

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<sup>38</sup> Latour (n 6) 238-239. Latour's work can itself be criticised along similar lines, including that it offers 'incoherence disguised as [complexity]' (perhaps comprising bullshit in Frankfurt's terms) and (contrary to the supposed ends of critical theory) that it 'conceals an agenda that is not only uncritical but deeply politically conservative'. Indeed, RH Lossin suggests that '[i]f neoliberalism were a Platonic Republic, Bruno Latour would likely be its philosopher-king'. See Rebecca H Lossin, 'Neoliberalism for Polite Company: Bruno Latour's Pseudo-Materialist Coup' *Salvage* (1 June 2020) <<https://salvage.zone/articles/neoliberalism-for-polite-company-bruno-latours-pseudo-materialist-coup/>> accessed 3 June 2020.

<sup>39</sup> Zamora, 'Can We Criticize Foucault?' (n 19).

<sup>40</sup> Stuart Elden, 'Foucault and Neoliberalism – A Few Thoughts in Response to the Zamora Piece in Jacobin' (Progressive Geographies, 17 December 2014) <<https://progressivegeographies.com/2014/12/17/foucault-and-neoliberalism-a-few-thoughts-in-response-to-the-zamora-piece-in-jacobin/>> accessed 17 June 2019.

<sup>41</sup> Michael Behrent, Comment on 'Foucault and Neoliberalism – a few thoughts in response to the Zamora piece in Jacobin' by Stuart Elden, posted at 5:50am

Similar criticisms have been raised over the popularity of other theorists. Dylan Riley focuses on Pierre Bourdieu, 'whose enormous contemporary influence is only comparable to that previously enjoyed by Sartre or Foucault'.<sup>42</sup> Riley argues that in US academia the popularity of Bourdieu's critical theory 'is due neither to its explanatory power nor to its ability to generate new problems and questions'.<sup>43</sup> Rather, Bourdieu 'resonates with the lived experience of elite academics, offers a form of ersatz radicalism focused on self-transformation, and provides the sociologist' – or, indeed, other disciplinary scholar – 'with a sense of having an elevated social role'.<sup>44</sup>

Thompson, arguing against Louis Althusser, posits that such critical theory allows scholars 'to perform *imaginary* revolutionary psycho-dramas [...] while in fact falling back upon a very old tradition of bourgeois elitism for which Althusserian theory is exactly tailored'.<sup>45</sup> Phil Burton-Cartledge is more charitable to Althusser than Thompson, but the danger of Althusserian bullshit is also evident in his reading. Burton-Cartledge notes, for instance, that Althusser's *For Marx* 'ruthlessly attacks woolly thinking while, ironically, exhibiting some itself'.<sup>46</sup>

In these scenarios, critical theory seems to be more for reassuring academics of their own importance and for maintaining their status and position in society, rather than for challenging orthodoxy.<sup>47</sup> Indeed, in canonising particular approaches, new orthodoxies can be created.<sup>48</sup> Furthermore, as

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(Progressive Geographies, 21 December 2014) <<https://progressivegeographies.com/2014/12/17/foucault-and-neoliberalism-a-few-thoughts-in-response-to-the-zamora-piece-in-jacobin/#comment-69426>> accessed 17 June 2019; see also Behrent (n 23).

<sup>42</sup> Riley (n 19) 107.

<sup>43</sup> Riley (n 19) 136.

<sup>44</sup> Ibid. Lossins (n 38), similarly, argues that Latour's 'academic popularity is both understandable and disturbing' given he 'has, over several decades, elaborated a grand system of thought that is seductively materialist in appearance, and deeply reactionary in substance'.

<sup>45</sup> Thompson (n 7) 3.

<sup>46</sup> Phil Burton-Cartledge, 'Five Books on Marx and Marxism' (All That Is Solid..., 6 May 2013) <<http://averypublicsociologist.blogspot.com/2013/05/five-books-on-marx-and-marxism.html>> accessed 14 August 2019.

<sup>47</sup> See Riley (n 19); Latour (n 6) 239; Sharp (n 12); Lossins (n 38).

<sup>48</sup> Dudai (n 17); Chorley and others (n 18).

discussed further below in relation to critical theory reinforcing the prevailing order, maintaining distinct divides between disciplines reinforces orthodoxies within academia. Critical legal theory's place within law as a discipline, for example, reinforces the idea that the study of law ought to be treated as distinct from (and in some approaches, more important than) the study of other phenomena.<sup>49</sup>

### III. OBSCURING POSSIBILITIES FOR RADICAL CHANGE

There is often a theory-practice divide.<sup>50</sup> Whilst some insist critique *is* practice or theory *is* practice,<sup>51</sup> this is only true to an extent.<sup>52</sup> Radical change rarely emanates from professionalised intellectual spaces. Social movements, of course, have their own organic intellectuals.<sup>53</sup> Much of the time, however, for the organic intellectuals of social movements engaged in on-the-ground struggle it is difficult to see what it matters what Foucault said to Sartre on a wet Wednesday in 1979.<sup>54</sup> Indeed, what was said might not even have been very interesting to those concerned with the political debates in which they

<sup>49</sup> Miller (n 16). Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16); Dudai (n 17).

<sup>50</sup> Thompson (n 7) 3; Dudai (n 17).

<sup>51</sup> Michel Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Donald F Bouchard and Sherry Simon trs, Cornell University Press 1977) 208; Larry Shiner, 'Reading Foucault: Anti-Method and the Genealogy of Power-Knowledge' (1982) 21 *History and Theory* 382, 383.

<sup>52</sup> Faith (n 23); Conor Gearty, 'Human Rights Research Beyond the Traditional Paradigm: Afterword' in Damian Gonzalez-Salzberg and Loveday Hodson (eds), *Research Methods for International Human Rights Law: Beyond the traditional paradigm* (Routledge 2019).

<sup>53</sup> David Forgacs (ed), *The Gramsci Reader: Selected Writings 1916–1935* (New York University Press 2000) 300–311; also Corinne Lennox and Yeşim Yaprak Yıldız, 'Activist Scholarship in Human Rights' (2020) 24 *International Journal of Human Rights* 4; Coleman (n 25).

<sup>54</sup> Arthur Scargill, former president of the National Union of Mineworkers, dismissed critics associated with small Marxist groupings with the derisive question 'What does it matter what Trotsky said to Lenin on a wet Wednesday in 1917?'. See Simon Harvey, 'Arthur Scargill and the End of a Fantasy' (Miner's Advice) <[https://www.minersadvice.co.uk/yourview21\\_scargill\\_fantasy.htm](https://www.minersadvice.co.uk/yourview21_scargill_fantasy.htm)> accessed 17 June 2019; for Scargill using a similar turn of phrase see Arthur Scargill, 'The New Unionism' (1975) 92 *New Left Review* 3, 12.

were intervening.<sup>55</sup> It might, in fact, have been bullshit. Edward Said, for example, was disappointed with both Sartre and Foucault's (lack of) intellectual and political engagement on Palestine.<sup>56</sup>

Likewise, Riley explains Bourdieu's popularity as, in part, 'growing out of the separation of intellectuals from mass political movements'.<sup>57</sup> Thompson makes a similar criticism of Althusserian theorists who 'would *like* to be "revolutionaries"' but are

the products of a particular 'conjuncture' which has broken the circuits between intellectuality and practical experience (both in real political movements, and in the actual segregation imposed by contemporary institutional structures).<sup>58</sup>

Indeed, '[w]hen academics cannot talk to anyone except one another, and even then with difficulty, there can be no political weight to their theorizing'.<sup>59</sup> When this occurs, critical theory is neither companion nor guide to radical change.<sup>60</sup>

Furthermore, as Conor Gearty notes, critical legal theorising may be of limited practical use to those who are, for example, attempting to persuade actually existing courts to protect a vulnerable or targeted group.<sup>61</sup> What those engaged in the realities of practice – influenced and compromised by manifestations of power and politics – can meaningfully take from the (possible) insights of critique is an open question which ought to be engaged with.<sup>62</sup> Responding to Martti Koskeniemi's critical theoretical approach to

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<sup>55</sup> Langlois (n 13); Coleman (n 25).

<sup>56</sup> Edward Said, 'Diary: An Encounter with J-P Sartre' (2000) 22 *London Review of Books* 42.

<sup>57</sup> Dylan Riley, 'Science and Politics: A Response to Burawoy, Heilbron, and Steinmetz' (2018) 2 *Catalyst* 88, 116.

<sup>58</sup> Thompson (n 7) 3.

<sup>59</sup> Faith (n 23) 267; also Richard Michael Fischl, 'The Question That Killed Critical Legal Studies' (1992) 17 *Law and Social Inquiry* 779, 804-805; Langlois (n 13).

<sup>60</sup> *Critical Legal Thinking* (n 5).

<sup>61</sup> Gearty (n 52). See also Isobel Roele, 'Policing Critique' (2018) 81 *Modern Law Review* 701, 711.

<sup>62</sup> Dudai (n 17); Lennox and Yıldız (n 53); Coleman (n 25); Lara Montesinos Coleman, 'Struggles, Over Rights: Humanism, Ethical Dispossession and Resistance' (2015) 36 *Third World Quarterly* 1060.

international law, and his preferred form of critical international law professional, Isobel Roele, for instance, ponders '[w]ho is this individual who exercises professional judgment in a way that resists power and is driven by emotional instinct?'. She argues that 'Koskenniemi swathes [the ideal critical professional] in so many gauzy layers of misdirection that they escape our intellectual grasp'.<sup>63</sup> Koskenniemi argues that

critical law is perhaps not reducible to abstract discourses, methods or 'principles' but identified by a gut feeling about the way the injustice of the world is a *product* of its ruling symbolic order and therefore cannot be treated through it.<sup>64</sup>

However, Roele responds that 'Koskenniemi gestures his intentions and avoids packaging this idea in easily abstractable language. His ideas are revealed obscurely – carefully coded messages to like-minded lawyers'.<sup>65</sup> In this approach, there is a danger of Koskenniemi's ideas taking the form of bullshit. According to Roele, Koskenniemi

not even naming his politically-engaged, emotionally-aware moral agent of an international lawyer undermines the critically transformative power of the idea. This anonymous aspiration is hope incognito, a figure that will only be recognised by those already in-the-know.<sup>66</sup>

One does not have to be in the business of writing 'recipes [...] for the cook-shops of the future'<sup>67</sup> to be troubled by demobilising and demotivating implications of some critical legal theory. This is particularly the case in the strand of critical legal theory which tends towards 'trashing' – including of arguably (or, at least, potentially) progressive tendencies such as human rights – to the exclusion of 'putting forward constructive moral arguments'.<sup>68</sup> Some

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<sup>63</sup> Roele (n 61) 712.

<sup>64</sup> Martti Koskenniemi, 'Epilogue: To Enable and Enchant – on the Power of Law' in Wouter Werner, Marieke de Hoon and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017) 411.

<sup>65</sup> Roele (n 61) 712.

<sup>66</sup> Ibid.

<sup>67</sup> Karl Marx, *Capital: A Critique of Political Economy, Volume I* (Ben Fowkes tr, Penguin 1976) 99.

<sup>68</sup> McManus (n 18); also Sharp (n 12); Fischl (n 59); on the potentially progressive character of human rights see Langlois (n 13); Dudai (n 17); Malcolm Langford,

of these critiques (whether framed as 'trashing' or not) are *uncritical* in that they are empirically questionable, constructing then defeating straw-men. For example, the critiques raised by David Kennedy in the influential piece 'The International Human Rights Movement: Part of the Problem?' are by his own admission 'assertions, worries, polemical charges' and 'none of them has been proven'.<sup>69</sup>

Raising, thinking through and responding to these kinds of concerns can be a useful exercise. More critical advocacy might emerge from the invitation to human rights advocates to consider questions like Kennedy's. For example, asking whether alternative – possibly more effective – vocabularies are crowded out by human rights framing, thinking through what is obscured or lost in focusing too much on the law and legal methods of advocacy, or problematising the – overly rigid – categories, roles and binary distinctions (victim/perpetrator, rights-holder/duty-bearer, refugee/citizen, and so on) which mainstream human rights advocacy can rely upon. However, as Kennedy himself notes, raising a concern does not prove its veracity, nor does it necessarily undermine the soundness of possible responses. Likewise, the raising of such concerns does not in itself help in the identification or pursuit of opportunities for radical change.

For Stammers, 'uncritical critics take evidence of the abuse of institutionalised human rights as conclusive proof that human rights can only ever serve the interests of power'.<sup>70</sup> At its most egregious, this kind of uncritical critique – being 'gloriously unencumbered by any perceived need

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'Critiques of Human Rights' (2018) 14 Annual Review of Law and Social Science 69; Lennox and Yildiz (n 53); Coleman (n 62); Mark Heywood, 'South Africa's Journey from Socialism to Human Rights: The True Confessions of an Errant Socialist' (2019) 11 Journal of Human Rights Practice 305.

<sup>69</sup> David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 Harvard Human Rights Journal 101, 101. For a direct response to Kennedy's arguments see Hilary Charlesworth, 'Author! Author!: A Response to David Kennedy' (2002) 15 Harvard Human Rights Journal 127. For further discussion of this in relation to human rights see Paul Gready, 'The Politics of Human Rights' (2003) 24 Third World Quarterly 745; Stammers, *Human Rights and Social Movements* (n 12); Langlois (n 13); Dudai (n 17).

<sup>70</sup> Stammers, 'Human Rights and Social Movements: Theoretical Perspectives' (n 12) 76.



for supporting evidence'<sup>71</sup> – is bullshit. This is not to deny that 'norms – including human rights norms – are open-ended, amenable to contrasting interpretations and to the support of contradictory agendas' including both institutionalisation in the interests of power, and, more progressively, mobilisation as 'struggle concepts' in challenges to power posited by social movements.<sup>72</sup> Similar lessons can be taken from Samuel Moyn's position that human rights are neither a panacea nor inherently neoliberal or anti-egalitarian.<sup>73</sup> Indeed, using Stammers's terms, both the uncritical advocates and uncritical critics (who might claim human rights norms as monolithically positive or negative) ought to be opposed.<sup>74</sup>

Costas Douzinas has argued that '[m]ost critics of rights belong today to the political left'.<sup>75</sup> Even if this was true at the time of his writing, which is doubtful,<sup>76</sup> it is difficult to make the case that this remains so, at least in the Global North.<sup>77</sup> It is more plausible that most *academic* critics of rights come from the political or, at least, academic left.<sup>78</sup> One might also posit a difference between (academic) *critics* of rights and (political) *opponents* of

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<sup>71</sup> Gready (n 69) 747.

<sup>72</sup> On contrasting interpretations and contradictory agendas of human rights, see Koskeniemi (n 64) 400; on human rights as social movement struggle concepts, see Stammers, 'Human Rights and Social Movements: Theoretical Perspectives' (n 12); Stammers, *Human Rights and Social Movements* (n 12) 3.

<sup>73</sup> See Samuel Moyn, 'Human Rights Are Not Enough' *The Nation* (9 April 2018) 20–22.

<sup>74</sup> See Stammers, *Human Rights and Social Movements* (n 12).

<sup>75</sup> Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart 2000) 148.

<sup>76</sup> See, for example, Charlesworth (n 69).

<sup>77</sup> See, for example, Bethany Rodgers, 'Human Rights in the UK Media: Representation and Reality, 19 September 2014' (2015) 8 Networking Knowledge; Andrew Clapham, 'Where to Now? How Can We Challenge Human Rights Disenchantment?'. Keynote address presented at the conference 'Challenging Human Rights Disenchantment 50 years on from the ICCPR and ICESCR', Sussex Centre for Human Rights Research, University of Sussex, Brighton, 27 January 2017; Langford (n 68); Lennox and Yıldız (n 53); Heywood (n 68).

<sup>78</sup> On critical and uncritical critics and proponents of human rights see Stammers, *Human Rights and Social Movements* (n 12); also Langford (n 68).

rights,<sup>79</sup> in which case Douzinas's claim might better fit the evidence. Douzinas does not, however, explore such a distinction.<sup>80</sup>

One might reasonably agree with Foucault that everything – including human rights – is not *bad* but *dangerous*, but so what?<sup>81</sup> What does this tell anyone about understanding and responding to the world, including, for example, how they might attempt to address injustice? For example, the Foucauldian notion of dangerousness can be applied reflectively by both activists and scholars. Inviting them to consider the worst possible outcomes of their (dangerous) actions might lead to urging caution over naïve optimism. Causing harm – even endangering lives – through taking or supporting unduly confident and hopeful actions might then be avoided. However, part of the problem of this kind of critique is the idea that, in applying Foucauldian dangerousness, activists or scholars could be certain that they are taking the best action. There is the risk of a question-begging circularity in such an approach. Any bad outcome can be put down to a lack of caution or a failure to engage with dangerousness in what *must* therefore have been naïvely hopeful (perhaps insufficiently Foucauldian) approaches. On the other hand, any success can be marshalled as evidence that this *must* have been the best action, applying the correct degree of caution and awareness of dangerousness.

Similarly, applying a Foucauldian lens of analysis to human rights, Pheng Cheah makes a series of elisions, each of which might be questioned. Cheah argues that the realisation of economic, social and cultural rights 'became inseparable from policies of human development'. Moreover, '[h]uman development is the humanization of economic development', therefore

the humanity that is produced can also be deployed by states in their strategies for increasing their resources, thereby compromising and marring the human face of development.

Cheah posits that

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<sup>79</sup> See Lennox and Yıldız (n 53); Coleman (n 62).

<sup>80</sup> Douzinas (n 75). See also Langlois (n 13) for discussion of Douzinas's positions.

<sup>81</sup> Michel Foucault, 'On the Genealogy of Ethics: An Overview of Work in Progress'. In Paul Rabinow (ed), *The Foucault Reader* (Pantheon Books 1984) 343.

[t]he problem of implementing second- and third-generation human rights would need to be reconsidered from the ground up [...] in terms of the very structure of biopolitical rights [and] in terms of the inscription of these rights in a biopolitical field that is always shifting.<sup>82</sup>

However, what this would actually entail or how it might be done remains unclear.

The view from the critical (legal) theoretical high ground may be clear, but what of stepping into the 'swamp' of practice?<sup>83</sup> Pointing out the muddiness of the swamp does not in itself assist those who must traverse it to navigate a passable route. To paraphrase a question posed by an attendee at the 2015 Critical Legal Conference (CLC) during an informal conversation: *Foucauldian critique is all well and good, but what are you going to do about these refugees?* It is true that you cannot eat rights<sup>84</sup> – but then, you cannot eat critique either.

At its worst, critical legal theory leads to a kind of nihilism,<sup>85</sup> or 'fatalistic despair'.<sup>86</sup> Things are bad (or dangerous), attempts to improve them are also bad (or dangerous) – as they are complicit in keeping things bad or making them differently bad (or dangerous) – so there is no point pursuing change.<sup>87</sup> Foucault claimed his position led 'not to apathy but to a hyper- and pessimistic activism'.<sup>88</sup> However, according to Karlene Faith, it is also the case that '[r]eading history through Foucault, the ultimate horror is that,

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<sup>82</sup> See Pheng Cheah, 'Second-Generation Rights as Biopolitical Rights'. In Costas Douzinas and Conor Gearty (eds), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge University Press 2014) 231–232.

<sup>83</sup> Donald A Schön, *The Reflective Practitioner: How Professionals Think in Action* (Basic Books 1983) 42; also Gearty (n 52); Roele (n 61); Stammers, *Human Rights and Social Movements* (n 12); Sharp (n 12); Fischl (n 59); Langlois (n 13); Coleman (n 25); Coleman (n 62); Heywood (n 68).

<sup>84</sup> Choolwe Muzyamba, Elena Broaddus and Catherine Campbell, '"You Cannot Eat Rights": A Qualitative Study of Views by Zambian HIV-vulnerable Women, Youth and MSM on Human Rights as Public Health Tools' (2015) 15 BMC International Health and Human Rights ar26. DOI: 10.1186/s12914-015-0067-6.

<sup>85</sup> Jabbari (n 5) 507–508.

<sup>86</sup> Roele (n 61) 704.

<sup>87</sup> Roele (n 61) 719, 721; Langlois (n 13) 560; Jabbari (n 5); also Sharp (n 12); Dudai (n 17).

<sup>88</sup> Foucault (n 81) 343.

because power comes from everywhere, no one can be held responsible for power abuses'.<sup>89</sup> Indeed, Foucault's actions reflect this fatalism: despite 'continu[ing] to sign petitions throughout th[e] period' after 'his "two years" service' of more directly engaged activism in the 1970s,<sup>90</sup> Foucault argued that 'signing nothing or signing everything, either way, it amounts to the same'.<sup>91</sup>

Of course, 'knowing that something is broken is not the same thing as knowing how to fix it'.<sup>92</sup> Importantly, however, 'while it can deliver important insights, "relentless critique" alone will often prove insufficient to create a bridge between understanding and actual change in the world'.<sup>93</sup> Anthony J Langlois raises a similar issue:

some of those on the contemporary critical left [...] appear at times to leave the crushed of the world behind as they apparently conclude that the aporias of human rights (and political action more generally) preclude the possibility of (legitimately) doing anything for and/or with those in need.<sup>94</sup>

Langlois suggests that '[t]his discourse may leave one in raptures about such prospective revelations as a "new cosmopolitanism to come" [drawing on Douzinas]', though 'it will not, however, facilitate cosmopolitan justice for those who seek it *today*'.<sup>95</sup>

This is worth considering in relation to concrete instances of, and critical responses to, human rights advocacy. For instance, regarding responses to the (deeply flawed) *Kony 2012* video and advocacy campaign, Lars Waldorf notes that '[t]here's no question that *Kony 2012* smacks of missionary zeal and traffics in some tired tropes about Africa' but suggests that in responding to the campaign (and criticism of it) 'we should be less worried about the white man's burden and more worried about his indifference'.<sup>96</sup> He argues, citing

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<sup>89</sup> Faith (n 23) 264.

<sup>90</sup> Stuart Elden, *Foucault: The Birth of Power* (Polity Press 2017) 188.

<sup>91</sup> Cited in *ibid* 188.

<sup>92</sup> Sharp (n 12) 575.

<sup>93</sup> *Ibid*; see also Langlois (n 13); Coleman (n 25).

<sup>94</sup> Langlois (n 13) 560.

<sup>95</sup> *Ibid* (emphasis in original).

<sup>96</sup> Lars Waldorf, 'White Noise: Hearing the Disaster' (2012) 4 *Journal of Human Rights Practice* 469, 469. Flaws of *Kony 2012* have also been highlighted and

Irene Bruna Seu,<sup>97</sup> that many criticisms of *Kony 2012* utilise the same 'repertoires of denial' which 'enable [audiences] to morally justify their passivity' in response to Amnesty International's human rights appeals.<sup>98</sup> These are 'the medium is the message', which 'focuses on the attributed manipulative function of the appeal', 'shoot the messenger', which 'attacks the sender of the appeal', and 'babies and bathwater', which 'questions in various ways the validity of the action recommended in the appeal'.<sup>99</sup>

Waldorf argues that this 'risks reinforcing the public's sceptical consumerism towards human rights appeals as well as their moral apathy towards distant suffering'.<sup>100</sup> The same risks, and some of the same 'repertoires of denial' – especially 'babies and bathwater' – are evident in uncritical criticism of human rights more broadly,<sup>101</sup> as well as of other (no doubt highly imperfect)

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criticised by a number of other commentators, including Mahmood Mamdani. He argues that there is a risk that the video and campaign's 'well-intentioned but unsuspecting' audience 'will be responsible for magnifying the very crisis to which they claim to be the solution' due to the campaign's focus on a military rather than political response to Joseph Kony and the Lord's Resistance Army (LRA). Whilst atrocities allegedly committed by the Ugandan army in the name of 'counterinsurgency' are deprioritised, simultaneously, 'the LRA is given as the reason why there must be a constant military mobilization, at first in northern Uganda, and [then] in the entire region' and 'why the US must sen[d] soldiers and weaponry, including drones, to the region'. Mahmood Mamdani, 'The Downside of the Kony 2012 Video: What Jason did not tell Gavin and his army of invisible children' (Pambazuka News, 15 March 2012) <<http://www.pambazuka.net/en/category.php/features/80787>> accessed 16 September 2015. For further discussion see, for example, Sam Gregory, 'Kony 2012 Through a Prism of Video Advocacy Practices and Trends' (2012) 4 *Journal of Human Rights Practice* 463; David Hickman, 'Jason and the Internauts' (2012) 4 *Journal of Human Rights Practice* 475; Mark A Drumbl, 'Child Soldiers and Clicktivism: Justice, Myths, and Prevention' (2012) 4 *Journal of Human Rights Practice* 481.

<sup>97</sup> Irene Bruna Seu, "'Doing Denial': Audience Reaction to Human Rights Appeals' (2010) 21 *Discourse & Society* 438.

<sup>98</sup> Waldorf (n 96) 472.

<sup>99</sup> Seu (n 97) 443.

<sup>100</sup> Waldorf (n 96) 472.

<sup>101</sup> See *Ibid*; Seu (n 97); Stammers, *Human Rights and Social Movements* (n 12); Stammers, 'Human Rights and Social Movements: Theoretical Perspectives' (n 12); Gready (n 69); Langlois (n 13); Clapham (n 77); Dudai (n 17); Coleman (n 62).

mobilisations, such as Extinction Rebellion.<sup>102</sup> The possibility of change, radical or otherwise, is therefore obscured, or reduced, as attempts to pursue it – flawed though they may be – are dismissed outright, along with the overarching causes they promote.<sup>103</sup>

In these cases, the critical (legal) theorist occupies a position curiously reflecting the comic strip character Mister Gotcha, declaring 'I am very intelligent' whilst chastising those seeking to 'improve society somewhat' for nevertheless – supposedly hypocritically – 'participat[ing] in society'.<sup>104</sup> Whilst the comic satirises right-wing talking points, there is a real risk that critical (legal) theory – typically seen as a project of the academic, if not political, left<sup>105</sup> – absorbs these and reproduces them in barely-altered form. Whilst perhaps not advancing the view that the prevailing order need not be changed, such critical (legal) theory nevertheless undermines attempts to achieve change by suggesting they are hopelessly naïve, or necessarily complicit in maintaining the systems to which they are opposed.<sup>106</sup> This kind of critique invites responses similar in sentiment to those expressed by Ian MacKaye of the hardcore punk band Minor Threat in the song 'In My Eyes': 'You tell me that I make no difference / Well at least I'm fucking trying / What the fuck have you done?'.<sup>107</sup> The demand is not civil, to be sure, but it bears consideration:<sup>108</sup> if the goal of critical (legal) theory *is* radical change, what does it *actually do* to further this? Is it even trying?

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<sup>102</sup> Richard Seymour, 'Life or Death' (18 April 2019) <<https://www.patreon.com/posts/life-or-death-26191840>> accessed 19 December 2019.

<sup>103</sup> See Dudai (n 17).

<sup>104</sup> Matt Bors, 'Mister Gotcha' *The Nib* (13 September 2016) <<https://thenib.com/mister-gotcha>> accessed 2 August 2019.

<sup>105</sup> Costas Douzinas, 'Adikia: Critical legal theory and the future of Europe'. Plenary address presented at the conference 'Critical Legal Conference 2015: Law, Space and the Political', University of Wrocław, Wrocław, 3 September 2015; Fischl (n 59); Jabbari (n 5).

<sup>106</sup> Latour (n 6); Jabbari (n 5); Langlois (n 13); Sharp (n 12); Dudai (n 17).

<sup>107</sup> Minor Threat, 'In My Eyes', *In My Eyes EP* (Dischord Records 1981).

<sup>108</sup> On civility, see John Reynolds, 'Disrupting civility: amateur intellectuals, international lawyers and TWAIL as praxis' (2016) 37 *Third World Quarterly* 2098; Richard Seymour, 'Take your bourgeois civility and have a nice day' (27 February 2019) <<https://www.patreon.com/posts/take-your-and-24997555>> accessed 15 March 2019; Vann R Newkirk II, 'Protest Isn't Civil' *The Atlantic* (28



None of this is to suggest that good intentions are enough. Nor that trying to achieve positive change provides immunisation against, or absolution for, actually doing harm. Trying is, however, necessary for the pursuit of radical change, even if it is very far from sufficient. This is where questions emerge for producers and users of critical (legal) theory. Consistently, a question for those seeking radical change is how to pursue it – through what actions or politics? If critical theory lives up to its claims it ought to provide some guidance in this regard. This came to the forefront in recently attending a critical theory reading group, held in a law school, discussing Stuart Elden's *Foucault: The Birth of Power*.<sup>109</sup> Participants frequently raised questions about what a Foucauldian politics, or Foucauldian activism, would actually be and what it might mean. Answers were not clear or consistent. Moreover, such a politics, if it can be discerned, need not be good, progressive or effective.<sup>110</sup>

These questions, as well as those drawn from Cox highlighted above,<sup>111</sup> pose problems for critical legal theory, especially that which builds upon Foucault: who and what is this for, and what are the implications of its application? In answering these, too often critical legal theory falls short, the apparent – or, at least, plausible – implication being that radical change is not possible. Jessica Whyte, for instance, attempts to unpick the meaning and implications of Foucault's – on the face of it potentially contradictory – positions on human rights. In doing so, rather than providing clarity over whether and how change might be pursued with and through Foucauldian thought, Whyte offers more limited conclusions: that 'Foucault's willingness to look for the domination masked by discourses of right and warning that we should beware of introducing a new hegemonic thought under the guise of human rights seem more important than ever'.<sup>112</sup>

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June 2018) <<https://www.theatlantic.com/ideas/archive/2018/06/the-civility-instinct/563978/>> accessed 15 March 2019.

<sup>109</sup> Elden (n 90).

<sup>110</sup> Said (n 56); Zamora, 'Can We Criticize Foucault?' (n 19).

<sup>111</sup> Cox (n 1).

<sup>112</sup> Jessica Whyte, 'Human rights: confronting governments? Michel Foucault and the right to intervene' in Matthew Stone, Illan rua Wall and Costas Douzinas (eds), *New Critical Legal Thinking: Law and the Political* (Birkbeck Law Press 2012) 31. More broadly, see Roele (n 61); Jabbari (n 5); Dudai (n 17).



In contrast to uncritical critics,<sup>113</sup> Ron Dudai advocates a 'human rights practice perspective' as 'adopt[ing] a more complex position than either a triumphalist account or dead-end criticism'.<sup>114</sup> Richard Seymour, meanwhile, concludes that it is possible to be critical of movements such as Extinction Rebellion, due to them being 'hippy-moralists who appear to have a simpleminded and depoliticised conception of "power" and "the system"' whilst, nevertheless, extending 'full solidarity to the hippy-moralists'.<sup>115</sup> Mark Heywood, somewhat similarly, argues that in responding to the global political conjuncture (including inequality, violence, reactionary populism and looming environmental catastrophe), 'what is needed is not point-scoring but ideas' – including, but not limited to, those emerging from the human rights movements cast aside by 'the prevailing rights-sceptics' of (uncritical) critical scholarship.<sup>116</sup>

In thinking beyond both uncritical advocacy and uncritical criticism of human rights, it is also worth considering the existing and potential roles of translation and vernacularisation in the ways human rights are locally understood and applied.<sup>117</sup> Consideration should also be given to the scope for, and limitations of, activists' and affected communities' tactical use of the law – including legal human rights mechanisms – as well as to alternative tactics and alternative frameworks of understanding (although such alternatives are not always framed as based on critical legal theory).<sup>118</sup>

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<sup>113</sup> See Stammers, *Human Rights and Social Movements* (n 12).

<sup>114</sup> Dudai (n 17) 283-284.

<sup>115</sup> Seymour (n 102).

<sup>116</sup> Heywood (n 68) 317. Malcolm Langford similarly argues that 'a human rights project' is a necessary but 'not a sufficient condition for social transformation' – see Langford (n 68) 83.

<sup>117</sup> See, for example, Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108 *American Anthropologist* 38; Peggy Levitt and Sally Merry, 'Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States' (2009) 9 *Global Networks* 441; Kristi H Kenyon, 'Localizing the Global/Globalizing the Local: Reconciling Botho and Human Rights in Botswana'. In Joel R Pruce (ed), *The Social Practice of Human Rights* (Palgrave Macmillan 2015).

<sup>118</sup> See Kate Tissington, "'Tacticians in the Struggle for Change'? Exploring the Dynamics between Legal Organisations and Social Movements Engaged in Rights-Based Struggles in South Africa'. In Marcelle C Dawson and Luke Sinwell

Uncritical critique on the other hand, lacking nuanced engagement with actually existing conditions and attempts to change them, too often obscures or denies the possibility for radical change. This, in turn, can serve to reinforce the prevailing order.

#### IV. REINFORCING THE PREVAILING ORDER

The prevailing order does not only comprise economic and social structures, states and governments. It is also reflected in and reinforced by institutions such as the university, and behaviours within them.<sup>119</sup> The disciplining of the university is part of this.<sup>120</sup> Just as 'juridification as an imperial process of colonising other disciplinary structures and spheres with specifically legal modes of thought has been widely noted in legal and political theory',<sup>121</sup> so too is critical legal theory – like other (sub)fields – vulnerable to the effects of

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(eds), *Contesting Transformation: Popular Resistance in Twenty-First-Century South Africa* (Pluto Press 2012); Julia Suárez-Krabbe, *Race, Rights and Rebels: Alternatives to Human Rights and Development from the Global South* (Rowman & Littlefield International 2016). See also Moyn (n 73).

<sup>119</sup> Elsa Noterman and Andre Pusey, 'Inside, Outside, and on the Edge of the Academy: Experiments in Radical Pedagogies' in Robert H Haworth (ed), *Anarchist Pedagogies: Collective Actions, Theories, and Critical Reflections on Education* (PM Press 2012); Andre Pusey, 'Towards a University of the Common: Reimagining the University in Order to Abolish It with the Really Open University' (2017) 3 Open Library of Humanities 1; John Morrissey, 'Regimes of Performance: Practices of the Normalised Self in the Neoliberal University' (2015) 36 British Journal of Sociology of Education 614; Maja Davidovic, 'Why Gender and Diversity in the Classroom is Essential: A Research Student Perspective' (Durham University School of Government and International Affairs, 27 August 2019) <<https://www.dur.ac.uk/sgia/research/projects/genderanddiversity/raexperience/>> accessed 29 August 2019; see also Matthew Evans, 'Navigating the Neoliberal University: Reflecting on Teaching Practice as a Teacher-Researcher-Trade Unionist' (2020) 41 British Journal of Sociology of Education 574. Also Suárez-Krabbe (n 118).

<sup>120</sup> Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16); Miller (n 16); Bob Jessop and Ngai-Ling Sum, 'Pre-disciplinary and Post-disciplinary Perspectives' (2001) 6 New Political Economy 89.

<sup>121</sup> Stone, Wall and Douzinas (n 20) 2.

disciplinary parochialism and imperialism.<sup>122</sup> For instance, one of the major contributions of Douzinas – an academic rockstar among the British (or at any rate predominantly UK-based) tradition of critical legal theory – has been to posit and apply a difference between 'politics' and 'the political'.<sup>123</sup> The former represents the formal sphere of government and administration, whereas the latter refers to the actual workings – and contestation – of power, ideology and material interests.<sup>124</sup> This can be a useful heuristic. It is not, however, especially profound.

Furthermore, in putting forward a narrow view of 'politics' in order to contrast this with 'the political' some of the problems of disciplinary imperialism are evident. For instance, few within the discipline of politics,<sup>125</sup> are likely to agree with a narrow definition of 'the politics of "political science"' as a 'conflation of political discourse with the routine political debates of the day, and around the machinations of parties, ministers and lobbyists', which turns 'social and economic conflict into a matter of accountancy, and ideology into calculated party manifestos'.<sup>126</sup> Even though such an approach to 'political science' does exist, it is not necessarily

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<sup>122</sup> Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16).

<sup>123</sup> Costas Douzinas, *Human Rights and Empire: The political philosophy of cosmopolitanism* (Routledge-Cavendish 2007) 102-103. Douzinas is (co-)author and (co-)editor of several major books in critical legal studies, and is an editor of *Law and Critique* ('the prime international critical legal theory journal'). See Law and Critique, 'Description' <<https://link.springer.com/journal/10978>> accessed 25 July 2019; Law and Critique, 'Editorial Board' <<https://www.springer.com/philosophy/philosophy+of+law/journal/10978?detailsPage=editorialBoard>> accessed 25 July 2019. On the British critical legal tradition, see Douzinas and Gearey (n 18) 239-247.

<sup>124</sup> Douzinas (n 123) 102-103; Stone, Wall and Douzinas (n 20) 3-4.

<sup>125</sup> See, for example, Adrian Leftwich (ed), *What is Politics? The Activity and its Study*, Revised Edition (Polity Press 2004).

<sup>126</sup> Stone, Wall and Douzinas (n 20) 3. Koskeniemi, similarly, summarises his 'critique of the political science enterprise' with a broad anecdote of 'countless PhD students' who 'complain about their being instructed to write on such abstractions as "liberalism", "realism", "constructivism" etc.' (alongside some more substantial evidence of the dominance of positivist approaches in international relations scholarship in the US academy). Koskeniemi (n 64) 399-400, 411.

dominant, nor is it taken for granted by those disciplined as political scientists.<sup>127</sup>

Several scholars used by critical legal theorists to build this argument could just as easily be categorised as part of the discipline of politics (at least in the subdiscipline of political theory) as they could within law or legal theory.<sup>128</sup> Something of a false dichotomy between disciplines appears to be evident.<sup>129</sup> Nor, one might suspect, is it especially likely that scholars acquainted with disciplinary work in areas such as politics or sociology would be bowled over by the revelation that power operates in and through institutions and processes (such as law) – and their study – which are presented as neutral or value-free.<sup>130</sup> As an example of this position in critical legal theory, consider that the editors of a major collection note that 'if there is an overarching argument to the book, it is an argument for the renewal of our understanding of legality's complicity with politics and power'.<sup>131</sup> That legality is complicit with politics and power is not a revelation. Having established this, the question then is how an understanding of this, its implications, and responses to it might be furthered – and what this might mean. If, like Koskenniemi, one identifies 'a gut feeling about the way the injustice of the world is a *product*

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<sup>127</sup> Leftwich (n 125); on disciplining of scholars see Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16). In Leftwich's volume, Leftwich (n 125), for example, a – potentially somewhat similar – distinction is made between 'the use of the word "politics", with a lowercase "p", refer[ing] to the actual activity out there in the world' and 'the word "Politics" (or Political Science), with an upper-case "P", refer[ing] to the academic discipline, that is to the study of political life'. See Adrian Leftwich, 'Preface'. In Adrian Leftwich (ed), *What is Politics? The Activity and its Study*, Revised Edition (Polity Press 2004) viii.

<sup>128</sup> Douzinas (n 123) 102–105; Stone, Wall and Douzinas (n 20) 3–4.

<sup>129</sup> On this trend in general see Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16).

<sup>130</sup> Howard S Becker, 'Whose Side Are We On?' (1967) 14 *Social Problems* 239; Alvin W Gouldner, 'Anti-Minotaur: The Myth of a Value-Free Sociology' (1962) 9 *Social Problems* 199; Cox (n 1); also Fischl (n 59) 802; Dudai (n 17).

<sup>131</sup> Matthew Stone, Illan rua Wall and Costas Douzinas, 'Preface' in Matthew Stone, Illan rua Wall and Costas Douzinas (eds), *New Critical Legal Thinking: Law and the Political* (Birkbeck Law Press 2012) ix. Likewise, see Koskenniemi's position that 'it seems necessary to me to re-describe professionalism and the various expert languages as *already political*'. Koskenniemi (n 64) 404.

of its ruling symbolic order and therefore cannot be treated through it', what then is to be done about it?<sup>132</sup>

Who and what is (critical legal) theory for in these instances? Partly it appears to be trying to show that critical legal theory as a subdiscipline is able to solve problems caused by law as a discipline (by criticising the idea that law is neutral in relation to politics and power), and by extension, to solve problems which might otherwise be approached from the perspective of other disciplines such as politics or sociology.<sup>133</sup> Disciplinary divides in academia, and the influence this has outside academia, form part of the prevailing order.<sup>134</sup> Critical legal theory does not often challenge this disciplinary order and can in fact reinforce it. Indeed, Douzinas and Adam Gearey argue that a key contribution of the 'Brit Crit' movement (which they largely treat as synonymous with the CLC) is to 'have reintroduced legal scholarship *where it always belonged*, at the heart of the academy'<sup>135</sup> – so 'disciplinary imperialism', one might argue.<sup>136</sup> David Jabbari, by contrast, reflecting the other side of the same coin, suggests that '[a]nalyzing the impact of legal norms on other social systems is arguably the role of the sociologist'<sup>137</sup> rather than the legal scholar – so 'disciplinary parochialism', then.<sup>138</sup>

Who these instances of critical legal theorising are for, on the face of it, largely seems to be other legal scholars (and, possibly, practitioners). There is something to be said for this. Legal education and scholarship often focus upon a narrow set of methodologies and attendant theoretical assumptions, which it is valuable to interrogate and expand.<sup>139</sup> Moreover, '[s]tudents of

<sup>132</sup> Koskenniemi (n 64) 411; also Roele (n 61); more broadly, see, for example, Dudai (n 17).

<sup>133</sup> See, for example, Jabbari (n 5).

<sup>134</sup> Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16); Miller (n 16); Stammers, *Human Rights and Social Movements* (n 12).

<sup>135</sup> Douzinas and Gearey (n 18) 240, emphasis added; see also Douzinas (n 75) vii.

<sup>136</sup> Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16).

<sup>137</sup> Jabbari (n 5) 538.

<sup>138</sup> Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16).

<sup>139</sup> Bal Sokhi-Bulley, 'Alternative Methodologies: Learning Critique as a Skill' (2013) 3 *Law and Method* 6; McManus (n 18).

critical theorists often go on to become practitioners, constituting an important vector of influence' on '[e]volutions in practice'.<sup>140</sup> However, encouraging law students, legal scholars and lawyers to think outside the dominant paradigms of their field<sup>141</sup> is a far cry from 'challenging [...] systemic injustice' as 'the companion and guide of radical change'.<sup>142</sup>

Indeed, these issues are worth considering in relation to Douzinas having latterly been a member of Greece's Hellenic parliament, elected for Syriza – something of a collision between legal critique, 'politics' and 'the political' perhaps.<sup>143</sup> There are plainly contradictions in Syriza as a self-declared anti-austerity party of the left implementing deep cuts, privatisations and austerity measures.<sup>144</sup> Syriza left government having failed to achieve radical change or challenge systemic injustice (some might argue they did not even try to achieve this) and having reinforced the prevailing neoliberal order, including the domination of Greece by the interests of the European Commission-European Central Bank-International Monetary Fund 'troika'.<sup>145</sup> Critical theorists' participation in government was clearly not enough to successfully 'challeng[e] [...] orthodoxy, ideology and systemic injustice' or provide 'the companion and guide of radical change'.<sup>146</sup>

Douzinas, of course, cannot be singled out as to blame for Syriza's failings. Nevertheless, the special appeal of various strands of critical theory to academics,<sup>147</sup> and the emphasis placed by Douzinas and others on placing

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<sup>140</sup> Sharp (n 12) 575.

<sup>141</sup> Sokhi-Bulley (n 139).

<sup>142</sup> Critical Legal Thinking (n 5); see also Roele (n 61).

<sup>143</sup> Douzinas reflects on this experience as an 'accidental politician' in a recent book, Costas Douzinas, *Syriza in Power: Reflections of an Accidental Politician* (Polity Press 2017).

<sup>144</sup> See Richard Seymour, 'Syriza: the denouement' (7 July 2019) <<https://www.patreon.com/posts/syriza-28201028>> accessed 26 July 2019; David Adler, 'The three mistakes behind Syriza's demise in Greece' *The Guardian* (8 July 2019) <[https://www.theguardian.com/commentisfree/2019/jul/08/syriza-demise-greece-alexis-tsipras?CMP=share\\_btn\\_tw](https://www.theguardian.com/commentisfree/2019/jul/08/syriza-demise-greece-alexis-tsipras?CMP=share_btn_tw)> accessed 26 July 2019; also Robert Knox, 'Against Law-sterity' *Salvage* (13 December 2018) <<https://salvage.zone/in-print/against-law-sterity/>> accessed 12 June 2020.

<sup>145</sup> Seymour (n 144); Adler (n 144).

<sup>146</sup> Critical Legal Thinking (n 5).

<sup>147</sup> Riley (n 19); Thompson (n 7).



legal critique 'at the heart of the academy' comes to mind.<sup>148</sup> Outside the academy, does such theory do what it claims? Perhaps not, at least in this case.<sup>149</sup>

Critical theory can also be deeply exclusionary.<sup>150</sup> Critical legal theory – much like other (sub)fields<sup>151</sup> – is dominated by a relatively small group of people (in large part, but not exclusively, made up of white men). Like other (sub)fields – and subcultures and political movements – critical legal theory includes some by excluding others.<sup>152</sup> Critique 'polices' and critical legal theorists engage in policing through both prescription and prohibition.<sup>153</sup> Knowledge of – and, at worst, conformity with – a particular canon of authors and approaches can be used as a gatekeeping device, so that in-groups and out-groups are demarcated by their familiarity with critical theory's terms of art and neologisms.<sup>154</sup> For example, an interlocutor responding to Elden's position on criticism of Foucault (and whether or not Foucault was sympathetic to neoliberalism),<sup>155</sup> raised the potential for critical theory to be dominated by small, exclusive, groups of 'experts'. They wondered, for instance,

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<sup>148</sup> Douzinas and Gearey (n 18) 240; Douzinas (n 75) vii.

<sup>149</sup> See also Langlois (n 13) for a discussion of Douzinas's theoretical positions in relation to an actually existing politics of austerity. More broadly, this is worth considering in light of austerity as 'a deeply juridical phenomenon', framed – including in Greece – as a (fixed) legal rather than 'political' (and therefore contestable) issue; see Knox (n 144).

<sup>150</sup> Caroline Ramazanoğlu, 'Introduction' in Caroline Ramazanoğlu (ed), *Up against Foucault: Explorations of Some Tensions between Foucault and Feminism*, 1-25 (Routledge 1993) 1; Bordo (n 23) 179.

<sup>151</sup> See, for example, Davidovic (n 119).

<sup>152</sup> See Phil Burton-Cartledge, 'Stanning for Corbyn, and Other Twitter Tribes' (All That Is Solid..., 5 August 2019) <<http://averypublicsociologist.blogspot.com/2019/08/stanning-for-corbyn-and-other-twitter.html>> accessed 8 August 2019; Roele (n 61) 705-706; John Henry Schlegel, 'CLS Wasn't Killed by a Question' (2007) 58 Alabama Law Review 967, 975.

<sup>153</sup> Roele (n 61) 705-706.

<sup>154</sup> Douzinas and Gearey (n 18) 247; Schlegel (n 152); Bordo (n 23) 179; also Thompson (n 7); Latour (n 6).

<sup>155</sup> Elden (n 40).



must we all become historians of French labor politics in the 1960s and 70s in order to understand Foucault? Must the tens of thousands of Anglo/American scholars in the humanities and social sciences who regularly cite Foucault become experts in post-war French political history in order to proceed with citing him?<sup>156</sup>

Furthermore, having participated in the CLC, experience suggests that despite its professed egalitarian, anarchist, horizontal organisational structure, the conference may be as pervaded by cliques and unequal (including gendered and heterosexist) power dynamics as other clubs and organisations, including those professing an egalitarian ethos.<sup>157</sup> This is not to say that critical (legal) theorists are necessarily unaware of these tensions and contradictions, though some may well be.<sup>158</sup> Nor is it to suggest that critical legal theory is worse than more mainstream currents in terms of reinforcing the prevailing order. Indeed, some other currents reinforce the prevailing order on purpose.<sup>159</sup> However, it is all the more necessary to respond to these tendencies given the overt purposes of critical theory.

There is something to be said for considering critical (legal) theory in light of Alexis Papadopolis's critique of certain manifestations of antifascism as 'group identity' – 'not what you do, but what you *are*'.<sup>160</sup> Papadopolis focuses on particular antifascist responses to regular mobilisations by the far-right Proud Boys in Portland, Oregon, USA – a city where 'probably more than

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<sup>156</sup> Progressive Geographies, Comment on 'Foucault and Neoliberalism – A Few Thoughts in Response to the Zamora Piece in Jacobin' by Stuart Elden, posted by the user wobblywheel at 6:01pm (Progressive Geographies, 4 January 2015) <<https://progressivegeographies.com/2014/12/17/foucault-and-neoliberalism-a-few-thoughts-in-response-to-the-zamora-piece-in-jacobin/#comment-73036>> accessed 17 June 2019.

<sup>157</sup> See, for example, Lara Montesinos Coleman and Serena A Bassi, 'Deconstructing Militant Manhood: Masculinities in the Disciplining of (Anti-)Globalization Politics' (2011) 13 International Feminist Journal of Politics 204; Ramazanoğlu (n 149) 1; also Davidovic (n 119); on the CLC, see Douzinas and Gearey (n 18) 239–247.

<sup>158</sup> Douzinas and Gearey (n 18) 247; Douzinas, Goodrich and Hachamovitch (n 18) 13–14; also Fischl (n 59); Schlegel (n 152).

<sup>159</sup> For discussion of this see, for example, Fischl (n 59).

<sup>160</sup> Alexis Papadopolis, 'Masochistic Milkshake Martyrs' *Damage* (28 October 2019) <<https://damagemag.com/2019/10/28/masochistic-milkshake-martyrs/>> accessed 6 November 2019. Alexis Papadopolis is presumably a pseudonym.

anywhere else in the country, any street activity by polo-shirted chauvinists is guaranteed to be met with an energetic and hostile response'.<sup>161</sup> Papadopolis argues that a mutual (sodomasochistic) relationship is formed between fascism and antifascism of this sort. Each needs the other so that group identity can be defined and maintained in opposition to – but also, in a sense, in complicity with – the other:

If antifascism is a group identity, then who wants to actually get rid of the fascists that buttress it? If antifascism is pleasure, then why submit it to the political needs of the situation? The sadist doesn't want to transform society; she wants perpetual motion: the fist colliding with Richard Spencer's face, repeating in time with the music, on an eternal loop.<sup>162</sup>

Something similar might be said of uncritical critical theorists. Such critics need the mainstream, the conservative, liberal and neoliberal to continue to exist so that group identity can be maintained as *being* critics – or even being 'crits'<sup>163</sup> – not *doing* criticism.

Papadopolis notes, echoing some of the criticism of critical legal theory outlined above – the sort rejected by Fischl<sup>164</sup> – that

[i]t's been well-argued that the left needs to get out of the habit of simply opposing the evils of the world – of merely defining itself as anti-racist, anti-capitalist, antifascist, etc – and start putting forward a positively articulated vision of what we *support*.<sup>165</sup>

However, the kind of relationship Papadopolis describes 'isn't even oppositionalism; at its worst, it's a kind of complicity'.<sup>166</sup> Papadopolis argues that '[i]f you do genuinely oppose something, first of all you have to refuse to adopt the role it prescribes for you'.<sup>167</sup> What might this mean in practice? For the antifascists Papadopolis discusses, the answer may be relatively straightforward (even if summed up in the format of a joke): 'A masochist

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<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Fischl (n 59). Douzinas and Gearey (n 18).

<sup>164</sup> Fischl (n 59).

<sup>165</sup> Papadopolis (n 160).

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

says, hit me. A sadist answers, no'.<sup>168</sup> For critical theorists, and those deploying critical theory, consideration must be given to what role they have been prescribed and how it might be refused. Lest it be forgotten, (critical legal) theorists and users of theory in the academy 'are involved in the reproduction of capital, regardless of the content of their lectures' – or publications.<sup>169</sup> This leads to the question of what they *can* do to refuse their prescribed roles or otherwise avoid the pitfalls these present.

## V. WHAT IS TO BE DONE?

How can bullshit be avoided and uncritical critique made to be critical? Can the pitfall of 'critique of critique' (of critique of critique) *ad infinitum* be avoided?<sup>170</sup> There are no easy answers – that is rather the point. Nevertheless, some possibilities are set out here. One possibility is abandoning – or at least weakening attachments to – divisions in scholarly disciplines.<sup>171</sup> This is set out next. After this, the related possibility of weakening divides between theory and practice is put forward,<sup>172</sup> followed by closing remarks on the key themes and implications of the article.

A move towards postdisciplinarity could militate against the problems of uncritical critical theory. If the study and theorisation of phenomena such as law and politics are not considered to be fundamentally separate activities

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<sup>168</sup> Ibid. This is not to suggest that fascism ought never to be physically confronted but rather to emphasise the need for reflection upon all tactics and strategies, and their effects. Such reflection must be on practices rather than on identities – it is the focus on identity, rather than on action and effect, which results in perverse complicity between antifascism (as identity) and fascism in the instances discussed by Papadopolis. See Stanislav Vysotsky, 'The Influence of Threat on Tactical Choices of Militant Anti-fascist Activists' (2013) 5 *Interface* 263; M Testa, '"A Good Deal of Disorder" or The Anarchists & Anti-Fascism In The UK' (2017) 25 *Anarchist Studies* 9; Charlotte Nichols, 'No Quarter for Fascists' *Tribune* (2 January 2020) <<https://tribunemag.co.uk/2020/01/no-quarter-for-fascists>> accessed 6 January 2020.

<sup>169</sup> Noterman and Pusey (n 119) 178; Evans (n 119); see also Suárez-Krabbe (n 118).

<sup>170</sup> Douzinas (n 105); Dudai (n 17).

<sup>171</sup> Miller (n 16); Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16); Rosenberg (n 16).

<sup>172</sup> See, for example, Sharp (n 12); Dudai (n 17).

then the importation of banalities packaged as insight from one discipline to another becomes less likely.<sup>173</sup> Concurrently – and intertwined with this – genuine insights of critical critique become more likely. Thinking beyond established disciplines encourages the development and use of tools appropriate to addressing matters of interest rather than the application of disciplinary tools to a narrower set of appropriate – or, worse, inappropriate – questions.<sup>174</sup> In practice, '[t]his would mean pursuing ideas without regard for the established borders of disciplines' and 'moving away from the idea that studies ought to have a home discipline in law or another discipline (even if the boundaries of this home are permeated by interdisciplinarity)'.<sup>175</sup> Indeed,

one way in which postdisciplinarity can add value is by bringing greater coherence to areas of study precisely because conforming to disciplinary boundaries (even if they are stretched by interdisciplinarity) leads to the arbitrary division of phenomena into component elements which are then approached from particular disciplinary perspectives rather than holistically.<sup>176</sup>

This expands the toolbox available to scholars and can thus contribute to 'clarify[ing the] range of possible alternatives' to the prevailing social and political order, in line with Cox's notion of critical theory's 'principle objective'.<sup>177</sup> This also, at least potentially, has the effect of rupturing the implicit hierarchies inherent in the placement of each discipline's critical

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<sup>173</sup> Fischl (n 59) 802; Darren J. O'Byrne, 'Marxism and Human Rights: New Thoughts on an Old Debate' (2019) 23 *International Journal of Human Rights* 638.

<sup>174</sup> Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16); Miller (n 16); Rosenberg (n 16).

<sup>175</sup> Matthew Evans, 'Interdisciplinarity and Punishment in the Academy: Reflecting upon Researching and Teaching Human Rights in University Settings'. Paper presented at the conference 'Re-visioning International Studies: Innovation and Progress', The International Studies Association's 60<sup>th</sup> Annual Convention, Sheraton Centre Toronto, Toronto, 27-30 March 2019, 11.

<sup>176</sup> Evans (n 175) 11; see also Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16); Miller (n 16); Rosenberg (n 16).

<sup>177</sup> Cox (n 1) 130.

theorists in a privileged position, uniquely able to see through the naïveté of the non-critical 'great unwashed'.<sup>178</sup>

Another, related, possibility is weakening the divide between theory and practice, not simply by asserting that they are the same thing, but by consistently engaging in the dialectical interrogation of each by the other.<sup>179</sup> The questions drawn from Cox form part of this: who and what is any given instance of theorisation for?<sup>180</sup> What does it mean for practice? Likewise, who and what is any given instance of practice for? What does it mean for theory? Practice here can be understood broadly, encompassing, for example, the professional activities of lawyers and scholars, as well as institutional and non-institutional forms of political activism.<sup>181</sup>

If critical theory is to be 'the companion and guide of radical change'<sup>182</sup> then it must '*clarify* [the] range of *possible* alternatives'.<sup>183</sup> The point is not only to understand the world, but also to change it.<sup>184</sup> Therefore, utopianism will not do:

if critical theory is to constrain its potential utopianism, as Cox argues it must, then an analysis of tactical and strategic policy questions associated with 'real world' implementation – and at higher level of detail than is typical of most critical studies literature – is required.<sup>185</sup>

Utopianism should not, however, be confused with radicalism.<sup>186</sup> If radical change is to actually occur with critical theory as its 'companion and guide',<sup>187</sup>

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<sup>178</sup> Latour (n 6) 239; see also Sharp (n 12), especially his summary of Frankfurt School critical theory at 575.

<sup>179</sup> Sharp (n 12); Dudai (n 17); Lennox and Yıldız (n 53); Coleman (n 25); Coleman (n 62).

<sup>180</sup> Cox (n 1).

<sup>181</sup> Dudai (n 17).

<sup>182</sup> Critical Legal Thinking (n 5).

<sup>183</sup> Cox (n 1) 130, emphasis added.

<sup>184</sup> Karl Marx, 'Theses On Feuerbach'. In Karl Marx and Frederick Engels, *Selected Works (in three volumes)* (vol 1, Progress Publishers 1969) 15.

<sup>185</sup> Sharp (n 12) 584.

<sup>186</sup> Frederick Engels, 'Socialism: Utopian and Scientific'. In Karl Marx and Frederick Engels, *Selected Works (in three volumes)* (vol 3, Progress Publishers 1970); see also Dudai (n 17).

<sup>187</sup> Critical Legal Thinking (n 5).

then those whose critique exposes the contradictions and the utopianism of, for example, mainstream and liberal approaches to law ought not to 'offer a utopian fantasy of [their] own'.<sup>188</sup> Utopias offer little in the way of guidance. However, 'relentless critique',<sup>189</sup> pointedly refusing to answer the 'what would you put in its place?' question,<sup>190</sup> also offers little guidance.<sup>191</sup> Some critical (legal) theorists might suggest that this is beside the point – that their aim is *not* to provide a guide for change.<sup>192</sup> Very well – this is perhaps where thinking 'against' and 'beyond' critical legal theory comes to the forefront rather than solely thinking 'in' it,<sup>193</sup> though plainly some critical legal theorists *do* intend their work to guide radical change.<sup>194</sup> One might draw a comparison with Papadopolis's challenge to Portland's antifascists to refuse to adopt the role prescribed for them by conditions to which they claim to be opposed.<sup>195</sup> Whether in, against, or beyond critical legal theory, for those who are committed to pursuing radical change, there is an imperative to think through how this might be achieved. Likewise, there is an imperative to think through how they might actually refuse complicity with the conditions they oppose.

Dustin Sharp's development of a Coxian approach to critical theory could be useful here.<sup>196</sup> Sharp suggests that problem-solving – status quo-accepting – and critical – status quo-disrupting – theories should not be treated as a simple binary.<sup>197</sup> Rather, the degree to which the status quo is reinforced or disrupted exists on a spectrum or 'continuum of critique'.<sup>198</sup> Sharp advocates 'integrated critique', bringing critical theory together 'in sustained and close

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<sup>188</sup> Fischl (n 59) 819.

<sup>189</sup> Sharp (n 12) 575.

<sup>190</sup> Fischl (n 59).

<sup>191</sup> Dudai (n 17); Langlois (n 13).

<sup>192</sup> See, for example, Fischl (n 59).

<sup>193</sup> See Holloway (n 15).

<sup>194</sup> Critical Legal Thinking (n 5). Jabbari (n 5).

<sup>195</sup> Though, Papadopolis notes, '[a]lready, this seems to be too much of a challenge: many self-described antifascists are deeply resistant to the idea. We're having fun here, and who are you to interfere with our fun?'. Papadopolis (n 160).

<sup>196</sup> Sharp (n 12); Cox (n 1).

<sup>197</sup> Sharp (n 12) 582–583.

<sup>198</sup> Ibid.

conversation' with 'critically motivated problem-solving theory'.<sup>199</sup> In Sharp's conception 'critically motivated problem-solving' differs from Cox's problem-solving theory<sup>200</sup> because it makes no claims to value neutrality.<sup>201</sup> Moreover, 'unlike most critical theory', it 'is keyed to understanding "the how" of bringing about the potential alternative orders for which critical theory has provided a very rough sketch. In other words, it sweats some of the small stuff that critical theory famously ignores'.<sup>202</sup> Sharp's 'critically motivated problem-solving theory' then 'corkscrews around the continuum of critique [...] helping to push things in one direction or another' – towards status quo-acceptance or disruption.<sup>203</sup> This kind of approach might be most obviously useful in areas such as human rights and transitional justice (Sharp's field), where 'the transmission of ideas from the academy to practice may be especially significant given the frequent migration of "pracademics" between the two worlds'.<sup>204</sup> It could, however, be applied more broadly in an attempt to resolve the kinds of tensions this article has identified.

## VI. CONCLUSION

A fundamental theme of the discussion in this article is that critical theorists and those making use of critical theory should consistently interrogate what it is they are doing and why they are doing it, as well as what the effects of what they are doing are. They should look at themselves in the mirror – but more than that, they should ensure that they have stepped out of the distorting hall of mirrors which is made up of both mainstream approaches and uncritical critique.<sup>205</sup> Having done this, they should ask themselves what they are doing, why they are doing it, who they are doing it for and what the implications are. These questions ought to haunt the producers and users of critical (legal) theory, and should return again and again to interrogate critical inquiry. If, on reflection, there are no clear answers to these questions – or if

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<sup>199</sup> Ibid 584.

<sup>200</sup> Cox (n 1).

<sup>201</sup> Sharp (n 12) 584.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid 575; see also Dudai (n 17).

<sup>205</sup> Stammers, *Human Rights and Social Movements* (n 12).



the answers are bullshit<sup>206</sup> – then an opportunity presents itself to think and act differently: to engage in more critical critique, or to move away from, or perhaps beyond, critical theory altogether. This, then, is the self-directed and outward-facing challenge laid down by the article, and the goal set by it.

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<sup>206</sup> Frankfurt, *On Bullshit* (n 8).